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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929—NO. [redacted] 397

CHARTER SHIPPING COMPANY, LTD.,

Petitioner,

—against—

BOWRING, JONES & TIDY, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THEODORE L. BAILEY,
Counsel for Respondent.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929—NO. 834.

CHARTER SHIPPING COMPANY, LTD.,
Petitioner,

—against—

BOWRING, JONES & TIDY, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION.

Statement of Additional Facts.

This action involves $5,750.

The opinion of the Circuit Court of Appeals in this case is reported in 33 Fed. Rep. (2nd Ser.) 280 and in 1929 American Maritime Cases 1116.

The petition does not deny that the cargo was shipped from American ports to a foreign port and, therefore, the Harter Act must apply, and the question of liability of the cargo in general average must be determined upon whether the strand was due to negligence or unseaworthiness or whether the vessel owner failed to use due diligence, before the commencement of the voyage from the American ports, to render the vessel seaworthy, properly equipped and manned.

But the petition fails to state that jurisdiction was secured in the Southern District of New York by the arrest under writ of foreign attachment by the United States Marshal of the SS. "Charterhulme", owned by the

petitioner, then lying in the New York harbor, and by the general (not special) appearance of the petitioner.

This action was brought for the recovery of a deposit made to secure the release of cargo from an alleged lien in general average. Such deposit stood in the place of the released cargo, and in the event that the Court determines upon the trial that there is no general average liability, such deposit (in lieu of the cargo) will be released from lien and delivered to the consignee, the respondent herein.

The strand which gave rise to the general average claim took place in the American port of Jacksonville. The cargo was American cargo shipped under American bills of lading, which upon the trial, will be shown to have incorporated the Harter Act and York Antwerp Rules of 1890, and also to have contained the Jason clause. Such bills of lading were issued by an American company as agent at American ports. The title to the cargo passed to the purchaser, the respondent herein, at an American port.

Some of the witnesses in regard to the strand and as to whether the same was negligent and due to unseaworthiness and lack of due diligence to make the vessel seaworthy, are within American jurisdiction (fols. 49-50).

The log entries show salting of the boilers and leaks in boiler tubes and constant breakdown of engines prior to the voyage and during the voyage (fol. 50).

The petition further fails to show that the construction of the Harter Act by English courts is different from that by the American courts.

The petition also fails to show that the rule in England as to the burden of proof as to due diligence is different from the rule in this country, nor does the petition show that the English Admiralty Court has no

jurisdiction to pass upon the question of liability in general average.

Furthermore, the petition omits to state that the respondent now holds security within the Southern District of New York (under the writ of foreign attachment), which security respondent will lose if the libel be dismissed.

The petition repeatedly states that the subject-matter is solely determinable by the British law, but in this the petition is clearly in error in that the only question in this case is whether the strand was negligent or caused by unseaworthiness or whether due diligence was used before the commencement of the voyage to make the vessel seaworthy, etc., as required by the American Harter Act and the bills of lading. The British law would not be permitted to vary the decision of this Court in *The Irrawaddy*, 171 U. S. 187, or to oust the Harter Act in requiring due diligence to have been used by the vessel owner before the commencement of the voyage, or to effect the construction of the American bill of lading by the American courts. This controversy is solely determinable by the American law.

Throughout the petition it is suggested that the Circuit Court of Appeals by reversing the District Judge, has criticized and condemned the District Judge, but such statement is not substantiated by the opinion, unless it can be said that each and every reversal constitutes a criticism of the Court so reversed.

At page 7 of the petition, it is suggested that numerous and complicated matters are involved in a general average situation. This is not correct, however, as to the instant case, where the only question involved is whether or not cargo is liable for any amount whatever in general average, *i. e.*, whether the strand was negli-

gent or whether due diligence was used by the vessel owner to make her seaworthy as required by the Harter Act and the bills of lading.

The libel alleges that the bills of lading were issued and upon the trial such bills of lading will be introduced in evidence. The libel also avers that all and singular, the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of the Honorable Court.

It is not essential to plead the bills of lading *in extenso*. The libel sufficiently pleads them by reference (fols. 9 and 10). The libel clearly raises the issue under the American Harter Act and under *The Irrawady*, 171 U. S. 187, and *The Jason*, 225 U. S. 32, as to whether the vessel was seaworthy (fol. 11), and due diligence had been used to render the vessel seaworthy, properly equipped and manned (fol. 14).

POINT I.

The decision of the Circuit Court of Appeals is in entire agreement with the decisions in this and other courts that have had occasion to deal with the question here presented.

The petitioner is desirous of having this suit tried in England. In fact, a few weeks subsequent to the beginning of this suit, petitioner filed in England a suit for a declaratory judgment. But as Judge Benedict has pointed out, the general rule is, that where there is a choice of forum, the libellant (respondent here) has the right of choice. *Chubb* v. *Hamburg-American Packet Co.*, 39 Fed. Rep. 431, 432.

Suitors in admiralty should not be compelled to resort to the home of the defendant, nor should they be prevented from suing in any District in which his goods or credits may be attached.

> "To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons *or his goods or credits attached*, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice." (Italics ours.)
>
> *In re Louisville Underwriters*, 134 U. S. 488, 493.

Admiralty will take jurisdiction of suits between foreigners. *The Maggie Hammond*, 9 Wall. 435, 450, 451, 457; *The Belgenland*, 114 U. S. 355, 365; *Fairgrieve* v. *Marine Insurance Company*, 94 Fed. Rep. 687 (C. C. A. 8th Circuit); *Attualita*, 238 Fed. Rep. 909 (C. C. A. 4th Circuit); *Danielsen* v. *Entre Rios Rys. Co.*, 22 Fed. Rep. (2nd Ser.) 326, 327; *The Kaiser Wilhelm der Grosse*, 175 Fed. Rep. 215, 216.

Especially is this so where the case arises in the country of the forum.

In *The Belgenland*, 114 U. S. 355, this Court said, at page 363:

> "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners *in cases not arising in the country of the forum;* as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a

> resort to its courts; or where they have agreed to resort to no other tribunals." (Italics ours.)

And at page 365:

> "But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *commune juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it."

In *The Maggie Hammond*, 9 Wall. 435, this Court said at page 451:

> "where the lien is given by the maritime law the question in such a case, in the admiralty courts of the United States, is not one of jurisdiction but of comity, as the jurisdiction to enforce a maritime lien for the breach of a contract of affreightment, either original or appellate, is, beyond controversy, conferred on all the Federal courts by the Judiciary Act."

The American Admiralty Court will take jurisdiction of a general average case, although the shipment was to a foreign port. *National Board of Marine Underwriters* v. *Melchers*, 45 Fed. Rep. 643, 645; *The Goward*, 1924 American Maritime Cases 1251.

Jurisdiction was had by the petitioners filing a general (not special) appearance. *Kaiser Wilhelm der*

Grosse, 175 Fed. Rep. 215, 216; *Benedict's Admiralty,* 4th Edition, Section 383.

Furthermore in the instant case a vessel of the petitioner was seized and attached within the territorial jurisdiction of the District Court for the Southern District of New York, pursuant to writ of foreign attachment.

A vessel owner is not entitled to contribution from cargo in general average in case of negligent strand or unseaworthiness. *The Irrawaddy,* 171 U. S. 187; *The Goward* (S. D. N. Y., 1924 Ward, J.), 1924 American Maritime Cases 1251, 1254; *Trinidad Shipping Co.* v. *Frame, Alston & Co. et al.,* 88 Fed. Rep. 528, 531; *Snow* v. *Perkins,* 39 Fed. Rep. 334, 335; *Hurlbut* v. *Turnure,* 76 Fed. Rep. 587, 589, affd. 81 Fed. Rep. 208, 211 (C. C. A. 2nd Cir.); *Gardner* v. *Bales Cotton,* 20 Fed. Rep. 529, 534; *Bowring* v. *Thebaud,* 42 Fed. Rep. 794, 800, affd. 56 Fed. Rep. 520, 522 (C. C. A. 2nd Cir.).

The bill of lading is an American contract and should be construed according to American law. *Liverpool, etc.* v. *Phenix Insurance Company,* 129 U. S. 397, 447, 448, 453, 461; *Yone Suzuki* v. *Central Argentine Ry.* (C. C. A. 2nd Cir. 1928), 27 Fed. Rep. (2nd Ser.) 795, 800; *The Majestic,* 60 Fed. Rep. 624, 627.

The American bill of lading controls the right to general average contribution.

In *The Jason,* 225 U. S. 32, this Court said at page 56:

> "Having already held that the general average clause contained in the bill of lading is valid as against the cargo-owner, it follows *ex necessitate* that it is valid in his favor."

The construction placed upon the Harter Act by the English court concerning general average, is quite different from the construction placed upon the same by the American court. *Lowndes on General Average* (1922), pages 32 *et seq.; Congdon on General Average* (1923), pages 29 *et seq.*

If respondent should be remitted to the English jurisdiction, it would be deprived of the liberal procedure of an admiralty court, inasmuch as the English Admiralty Court has no jurisdiction. *Maclachlin's Law of Merchant Shipping,* 6th Edition (1923), page 559; *Lowndes on General Average,* 6th Edition (1922), pages 412-417; *Pritchard's Admiralty Digest,* page 41.

The respondent bought and paid for American goods at an American port and shipped the same under an American bill of lading. Under such circumstances, the American Admiralty Courts will, pursuant to public policy, encourage foreign trade and the purchase of American goods by foreign customers. Admiralty Courts will not turn away foreign customers seeking protection in respect to American goods purchased in America and shipped from American ports under American contracts of carriage. When foreign customers invest in America and buy American goods and ship the same under an American contract of carriage, such customers are given the protection of the American bill of lading and Harter Act as construed by the American courts. Frequently, the Admiralty Courts of all countries are called upon to entertain jurisdiction of suits between aliens, arising out of collision and other incidents happening on the high seas where no American contract, no American statute, no American goods are involved.

The Circuit Court of Appeals properly reversed the

District Court. All that was necessary for the Circuit Court of Appeals to show, was one of the following:

(1) That the District Judge had exercised his discretion wrongfully, or

(2) That the District Judge had decided this case differently from the view which the Court of Appeals holds, or

(3) That the decision of the District Judge would have worked a failure of justice.

> *The Belgenland,* 114 U. S. 355, 368;
> *Heredia* v. *Davies,* 12 Fed. Rep. (2nd Ser.) 500, 501.

The only question involved in the present suit is whether the strand was negligent or whether the vessel owner used due diligence before sailing from an American port. It is implied in every contract of carriage of goods from an American port, that the shipment is subject to the terms of the Harter Act. *The Silvia,* 171 U. S. 462, 464, 465; *The Harter Act,* U. S. Compiled Statutes, Sections 8029-8031. The bills of lading in this case incorporated the Harter Act.

The American bills of lading properly regulated general average liability under the general maritime law and under the American law. *The Jason,* 225 U. S. 32, 41.

POINT II.

The application for writ of certiorari should be denied.

Respectfully submitted,

THEODORE L. BAILEY,
Counsel for Respondent.